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11
12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

14 CENTER FOR BIOLOGICAL DIVERSITY,
DEFENDERS OF WILDLIFE, SIERRA
15 CLUB, NATURAL RESOURCES DEFENSE
COUNCIL, NATIONAL PARKS
16 CONSERVATION ASSOCIATION,
WILDEARTH GUARDIANS, and THE
17 HUMANE SOCIETY OF THE UNITED
STATES

18 Plaintiffs,

19 v.

20 DAVID BERNHARDT, U.S. Secretary of the
Interior, U.S. FISH AND WILDLIFE
21 SERVICE, WILBUR ROSS, U.S. Secretary of
Commerce, and NATIONAL MARINE
22 FISHERIES SERVICE,

23 Defendants.
24
25
26
27
28

Case No. 4:19-cv-05206-JST
Related Case: No. 4:19-cv-06013-JST
Related Case: No. 4:19-cv-06812-JST

**BRIEF *AMICI CURIAE* OF
ENVIRONMENTAL LAW PROFESSORS
IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

Date: July 21, 2021
Time: 2:00 p.m.
Courtroom: 6, 2nd Floor
Judge: The Honorable Jon S. Tigar

Date Filed: August 21, 2019
Trial Date: None Set

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
IDENTITIES AND INTERESTS OF THE AMICI	1
BACKGROUND	1
ARGUMENT	3
I. THE ENDANGERED SPECIES ACT IS THE CORNERSTONE STATUTE FOR SPECIES CONSERVATION AND HAS PROTECTED IMPERILED SPECIES FOR OVER FORTY YEARS	3
II. THE ESA’S SUCCESS HINGES ON ITS WELL-CRAFTED STRUCTURE	6
A. Section 4 Listing of Species and Designation of Critical Habitats is a Biological Determination that Triggers the ESA’s Full Protections	6
B. Section 4(d) Establishes Protective Measures to Restore the Population of Threatened Species Before They Become Endangered and Extinction Becomes More Probable Than Not	9
C. Section 7 Consultation Integrates and Prioritizes the Protection of Listed Species in the Primary Missions of All Federal Agencies	10
III. THE CHALLENGED REGULATIONS UNDERMINE THE ESA’S WELL-CRAFTED STRUCTURE AND THREATEN ITS CONTINUED SUCCESS IN CONSERVING IMPERILED SPECIES	11
A. The Final Regulations Allow Non-Biological Factors to Influence the Services’ Listing and Classification Decisions	11
B. The Final Regulations Ignore the Benefits of Reducing Controllable Threats to Species and Allow Cumulative Impacts to Chip Away at Species and Their Habitat	14
C. The Final Regulations Will Leave Species Vulnerable to Climate Change Related Impacts	16
CONCLUSION	18
ADDENDUM	19

TABLE OF AUTHORITIES

CASES

<i>Alaska Oil & Gas Ass’n v. Jewell</i> , 815 F.3d 544, (9th Cir. 2016)	7
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<i>Ariz. Cattle Growers’ Ass’n v. Salazar</i> , 606 F.3d 1160 (9th Cir. 2010)	8
<i>State of California et al. v. Bernhardt et al.</i> , No. 4:19-cv-06013-JST (N.D. Cal. filed Sept. 25, 2019)	3
<i>Ctr. for Biological Diversity et al. v. Bernhardt et al.</i> , No. 4:19-cv-05206-JST (N.D. Cal. filed Aug. 21, 2019)	3
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STATUTES

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16 U.S.C. § 1533	2, 6
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16 U.S.C. § 1533(b)(1)(A)	7, 11
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1	16 U.S.C. § 1536(a)(1)	10
2	16 U.S.C. § 1536(a)(2)	10
3	16 U.S.C. § 1536(a)(3)	10
4	16 U.S.C. § 1536(b)(3)(A)	10
5	16 U.S.C. § 1538	6, 11
6	16 U.S.C. § 1539	6
7	16 U.S.C. § 1540	6
8	REGULATIONS	
9	50 C.F.R. § 17.31(a) (effective March 4, 2005 – Sept. 25, 2019)	7, 9
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IDENTITIES AND INTERESTS OF THE *AMICI*

Amici curiae are seventeen professors of environmental law. *Amici*'s expertise includes the Endangered Species Act, the National Environmental Policy Act, the Administrative Procedure Act, and natural resources management, among other areas of law. Combined, *amici* have decades of experience teaching these topics and have litigated numerous Endangered Species Act cases in many courts, including the United States Supreme Court. *Amici* have an interest in ensuring that the federal government retains its authority to use the Endangered Species Act to protect all listed species, as well as the nation's biodiversity. The list of *amici* and their school affiliations is located in the Addendum.

This *amici curiae* brief is filed upon consent of all parties.

BACKGROUND

On February 8, 1972, then-President Richard Nixon ("Nixon") made an address to Congress recognizing the responsibility of mankind as conservator of the natural world and outlining his environmental policy to fulfill this responsibility. Richard R. Nixon, 37th President of the United States, *Special Message to the Congress Outlining the 1972 Environmental Program* (February 08, 1972). In the address, Nixon recognized that the Endangered Species Preservation Act of 1966 "simply [did] not provide the kind of management tools needed to act early enough to save vanishing species." Nixon encouraged Congress to enact "a stronger law to protect endangered species." *Id.*

Nixon's address provoked quick and decisive action from Congress. The Endangered Species Act of 1973 ("ESA" or the "Act") was nearly unanimously approved and signed into law in less than a year after its inception. *Actions Overview S.1983—93rd Congress (1973-1974)*, CONGRESS.GOV, <https://www.congress.gov/bill/93rd-congress/senate-bill/1983/actions>; Pub. L. 93-205. The ESA encountered no significant opposition in Congress and was met with widespread public support. KEVIN J. O'BRIEN, AN ETHICS OF BIODIVERSITY 114 (2010). This broad approval was particularly astonishing given the ESA's sweeping and comprehensive approach to conserving endangered and threatened species of fish, wildlife, and plants. *Id.* As Nixon had proposed, the ESA "provide[s] for early identification..., make[s] taking of endangered species a

1 Federal offense..., and permit[s] protective measures to be taken before a species is so depleted
 2 that regeneration is difficult or impossible.” Nixon, *Special Message to the Congress*.

3 The ESA provides five integral protections to threatened and endangered species: (1)
 4 listing classifications; (2) critical habitat designations; (3) take prohibitions; (4) mandatory
 5 interagency consultation; and (5) prohibitions on federal activities that jeopardize the recovery of
 6 listed species or alter designated critical habitats. 16 U.S.C. §§ 1533, 1536. Congress deliberately
 7 structured these protective mechanisms such that they build on one another and ensure that neither
 8 federal activities nor a lack of agency funding undermine the protection of listed species.

9 The U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service
 10 (“NMFS”) (collectively, “the Services”) have jointly administered the ESA for nearly forty years
 11 with great success and without any significant changes to the implementing regulations. However,
 12 in 2019, despite widespread opposition from the scientific and conservation communities, the
 13 Services finalized amendments to regulations implementing ESA Section 4 listing decisions and
 14 critical habitat designations, Section 4(d) protections for threatened species, and Section 7
 15 interagency consultation requirements. Endangered and Threatened Wildlife and Plants;
 16 Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27,
 17 2019) (Section 4(d) Regulations); Endangered and Threatened Wildlife and Plants; Revision of the
 18 Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27,
 19 2019) (Section 4 Regulations); Endangered and Threatened Wildlife and Plants; Revision of
 20 Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (Section 7
 21 Regulations). In pertinent part, the final regulations repeal the blanket “take” protections afforded
 22 to threatened species, permit the inclusion of economic factors for consideration in listing
 23 decisions, and limit the use and efficacy of interagency consultations. *See id.* These amendments
 24 significantly weaken the individual conservation mandates provided in Sections 4, 4(d), and 7 of
 25 the ESA, and, taken together, destabilize the Act’s carefully crafted structure—leaving more
 26 species vulnerable to endangerment and extinction.

27 Several non-profit organizations with an interest in environmental conservation
 28

1 (“Environmental Group Plaintiffs” or “EGPs”)¹ filed this lawsuit challenging the legality of the
 2 finalized regulations under the ESA, the Administrative Procedure Act, and the National
 3 Environmental Policy Act.² The court is currently handling dueling motions for summary
 4 judgment from the EGPs and the Federal Defendants. *See* Order to Adjust Case Management
 5 Deadlines, *Ctr. for Biological Diversity et al., v. Bernhardt et al.*, No. 4:19-cv-05206-JST (N.D.
 6 Cal. Nov. 19, 2020) (ECF No. 111). *Amici curiae* Environmental Law Professors now respectively
 7 submit their position to aid the Court in adjudicating this matter.

8 ARGUMENT

9 **I. THE ENDANGERED SPECIES ACT IS THE CORNERSTONE STATUTE FOR** 10 **SPECIES CONSERVATION AND HAS PROTECTED IMPERILED SPECIES** **FOR OVER FORTY YEARS.**

11 In the 366 years between British colonization of North America and the enactment of the
 12 ESA, more than 500 North American species went extinct due to overhunting and commercial
 13 sale. BRIAN CZECH & PAUL R. KRAUSMAN, *THE ENDANGERED SPECIES ACT* (2001). These losses
 14 include Eastern Elk and other plains animals,³ large predators such as Cascade Mountain Wolves,⁴
 15 marine mammals such as Atlantic Gray Whales,⁵ and coastal wildlife such as Great Auks.⁶ In
 16 passing the ESA, Congress declared that extinction related to human activity is antithetical to
 17 mankind’s responsibility as nature’s conservator because “only natural extinction is part of natural
 18

19 ¹ *Ctr. for Biological Diversity et al. v. Bernhardt et al.*, No. 4:19-cv-05206-JST (N.D. Cal. filed
 20 Aug. 21, 2019). Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Natural
 21 Resources Defense Council, National Parks Conservation Association, WildEarth Guardians, and
 the Humane Society of the United States are collectively the Environmental Group Plaintiffs.

22 ² *See Animal Legal Def. Fund v. U.S. Dep’t of Interior et al.*, No. 4:19-cv-06812-JST (N.D. Cal.
 filed Oct. 21, 2019); *State of California et al. v. Bernhardt et al.*, No. 4:19-cv-06013-JST (N.D.
 Cal. filed Sept. 25, 2019).

23 ³ Extinct as of 1880. U.S. Fish & Wildlife Serv., *Extinct Species, Midwest Region Endangered*
 24 *Species*, <https://www.fws.gov/midwest/endangered/lists/extinct.html> (last visited Nov. 04 2020).

25 ⁴ CHARLES BERGMAN, *WILD ECHOES: ENCOUNTERS WITH THE MOST ENDANGERED ANIMALS IN*
NORTH AMERICA 256 (2003).

26 ⁵ JG Mead and ED Mitchell, Atlantic gray whales (1984), in *The Gray Whale*, London: Academic
 27 Press (ML Jones et al eds. Pp. 33-53 2005) (Extinct in America as of mid-1700s due to over
 whaling).

28 ⁶ Jessica E. Thomas et al., Demographic Construction from Ancient DNA Supports Rapid
 Extinction of the Great Auk, *eLife*, Nov. 2019, Abstract (Great Auk extinction in mid-1700s tied
 to the use of the species for its feathers), *available at* <https://elifesciences.org/articles/47509>.

order.” Ctr. for Biological Diversity, *A Wild Success American Voices on the Endangered Species Act at 40*, https://www.biologicaldiversity.org/campaigns/esa_wild_success/pdfs/A_Wild_Success.pdf (Quote from D-Rep. John Dingell).

Congress intended the ESA to protect species from extinction as “a consequence of economic growth and [societal] development un-tempered by adequate concern and conservation.” 16 U.S.C. § 1531(a)(1). To accomplish this aim, Congress designed the ESA with measures “to halt and reverse the trend towards species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). These measures include the identification of imperiled species and their habitats, and the protection of both from federal activity that may directly or incidentally jeopardize species’ continued existence. Congress intended the Services to facilitate species conservation until the species “recover” to the point where they no longer require the ESA’s safeguards. *See* Media Kit/Educational Resources, U.S. Fish & Wildlife Serv., <https://www.fws.gov/endangered/esa40/resources.html>; U.S. FISH & WILDLIFE SERV., ESA BASICS: 40 YEARS OF CONSERVING ENDANGERED SPECIES (2017), https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf.

Even with the ESA’s protections, human activities of the last fifty years have altered the natural world at a rate “unprecedented in human history.” IPBES, SUMMARY FOR POLICYMAKERS OF THE GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES OF THE INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVICES 5 (2019) <https://doi.org/10.5281/zenodo.3553579>. Today, human activities linked to habitat destruction and climate change threaten more species with extinction than ever before. *Id.* Biologists believe there is only a short twenty- to thirty-year window to effectively combat mass extinction, and that such efforts, if undertaken, will require transformative change. Gerardo Ceballos et al., *Biological Annihilation via the Ongoing Sixth Mass Extinction Signaled by Vertebrate Population Losses and Declines*, PNAS, <https://www.pnas.org/content/114/30/E6089> (July 10, 2017).

Through the ESA, Congress committed the entire country to the task of conserving every species at risk of extinction, recognizing that “the value of genetic heritage is, quite literally,

1 incalculable.” Jeff Curtis & Bob Davison, *The Endangered Species Act: Thirty-Eight Years on the*
 2 *Ark, in Open Spaces: Voices from the Northwest* 139 (2011) (Spoken by the House Marchant
 3 Marine and Fisheries Committee, now defunct).⁷ In developing the ESA, Congress examined the
 4 relationship between species diversity and mankind, and determined that a symbiotic relationship
 5 connects ecological and human health. *See* Curtis & Davison, *The Endangered Species Act:*
 6 *Thirty-Eight Years on the Ark* at 139. Congress developed an awareness that “as we homogenize
 7 the habitats in which [imperiled] plants and animals evolved, we threaten their—and our own—
 8 genetic heritage.” *Id.*

9 The ESA boasts a ninety-nine percent success rate in preventing extinction, Media
 10 Kit/Educational Resources, U.S. Fish & Wildlife Serv., [https://www.fws.gov/endangered/esa40/](https://www.fws.gov/endangered/esa40/resources.html)
 11 [resources.html](https://www.fws.gov/endangered/esa40/resources.html), and has saved several of our most iconic species from extinction, including the
 12 bald eagle, the gray wolf, and the green sea turtle, among many others. *Success Stories*,
 13 ENDANGERED SPECIES COALITION, <https://www.endangered.org/success-stories/> (last visited Oct.
 14 26, 2020); ENDANGERED SPECIES COALITION, BACK FROM THE BRINK: TEN SUCCESS STORIES
 15 CELEBRATING THE ENDANGERED SPECIES ACT AT 40 (2013). Without the ESA’s protections,
 16 fifteen percent of listed species would have gone extinct by 2006, and an even greater percentage
 17 likely would have faced extinction by 2018, when the contested regulations were proposed.
 18 KIERAN SUCKLING ET AL., CTR. FOR BIOLOGICAL DIVERSITY, ON TIME, ON TARGET: HOW THE
 19 ENDANGERED SPECIES ACT IS SAVING AMERICA’S WILDLIFE 2 (2012).

21 Simply put: the rate of extinction for species unprotected by the ESA is much higher than
 22 the rate of extinction for protected species. *Id.* Further, protected species are three times more
 23 likely than unprotected species to recover than to go extinct. Mark W. Schwartz, *The Performance*
 24 *of the Endangered Species Act*, 39 ANN. REV. OF ECOLOGY, EVOLUTION, & SYSTEMATICS 279, 290
 25

27 ⁷ Some scientists and economists have tried to quantify the value of nature’s genetic diversity,
 28 finding that nature provides \$24 trillion of non-monetized benefits to humans each year through
 food security, clean water, and reduction in coastal flooding. IPBES, The Regional Assessment
 Report on Biodiversity and Ecosystem Services for the Americas 56 (2019).

(2008). Listing under the ESA, designation of critical habitat, and the regulation of “take” collectively promote the survival and recovery of imperiled species. Martin F.J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55(4) BIOSCIENCE 360, 361-65 (2005); Schwartz, *The Performance of the Endangered Species Act*, 39 ANN. REV. OF ECOLOGY, EVOLUTION, & SYSTEMATICS at 290. The ESA’s long history of success in protecting and conserving species is due to the statute’s carefully crafted structure and longstanding implementing regulations.

II. THE ESA’S SUCCESS HINGES ON ITS WELL-CRAFTED STRUCTURE.

The ESA’s structure articulates a clear strategy to accomplish its conservation purposes. Generally, each section of the statute following the statement of purpose sets out a policy initiative and procedures to accomplish that initiative. These policy initiatives build on one another, with one section of the statute tending to trigger the requirements of the next. These initiatives are as follows: species designation as endangered or threatened, 16 U.S.C. § 1533; critical habitat designation, *id.*; cooperation between the Services, states, other federal agencies, and international bodies, *id.* §§ 1535, 1536; the Services’ duty to manage the conservation program and base determinations on the best biological information, *id.* § 1533; protective measures for endangered species, *id.* §§ 1533(d), 1538; exceptions to prohibited acts against endangered species, *id.* § 1539; and penalties and enforcement procedures for violations of the ESA, *id.* § 1540.

A. Section 4 Listing of Species and Designation of Critical Habitats is a Biological Determination that Triggers the ESA’s Full Protections.

Listing a species as endangered or threatened under Section 4 is a threshold status that triggers the rest of the ESA’s protections. *See id.* § 1533. In pertinent part, Section 4 provides the statutory framework upon which the Services may list or reclassify a species as threatened or endangered; permits the Services to delist species; and requires the Services to designate critical habitat for listed species. *Id.* § 1533(a)-(c). The prior long-standing regulations implementing Section 4 required that listing and reclassification decisions be made solely on the basis of the best available science, without reference to economic or other impacts; that decisions to delist a species be substantiated by data showing the species is clearly extinct, recovered, or was initially

1 classified in error; and described the rare circumstances in which the Services could find the
 2 designation of critical habitat to be imprudent. 50 C.F.R. §§ 424.11, 424.12 (effective March 4,
 3 2005 – Sept. 25, 2019).

4 *The “Threatened” Classification Was Intended to Prevent Species from Becoming Endangered.*

5 The purpose of Section 4 is “not only to protect the last remaining members of the species
 6 but to take steps to ensure that species which are likely to be threatened with extinction never
 7 reach the state of being presently endangered.” *Def. of Wildlife v. Norton*, 258 F.3d 1136, 1142
 8 (9th Cir. 2001) (quoting legislative history); *see also Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d
 9 544, 555 (9th Cir. 2016) (noting that the ESA is “concerned with protecting the future of the
 10 species, not merely the preservation of existing [animals]”). Congress placed great importance on
 11 “extending protections to species that may become endangered in the future.” H.R. Rep. No. 93-
 12 412 at 2, S. Rep. No. 93-307 at 3. The purpose of creating a separate threatened designation to
 13 protect those species before the danger of extinction becomes imminent and long-term action is
 14 required. S. Rep. No. 93-307 at 3. For nearly forty years, the FWS applied blanket protections to
 15 threatened species. 50 C.F.R. § 17.31(a) (effective March 4, 2005 – Sept. 25, 2019) (first enacted
 16 in April 1978 – Protection for Threatened Species of Wildlife, 43 Fed. Reg. 18181 (Apr. 28,
 17 1978)). This approach was both efficient and effective, as evidenced by the ESA’s successful
 18 conservation of threatened species. *Success Stories*, ENDANGERED SPECIES COALITION,
 19 <https://www.endangered.org/success-stories/>.

20 *Listing and Delisting Decisions are Based Solely on the Best Available Science.*

21 As originally enacted, the ESA dictates that “economic considerations have no relevance to
 22 determinations regarding the [listing] status of species,” because the question of whether a species
 23 has experienced sufficient decline to justify listing is not based on economics, but on biology.
 24 H.R. Rep. No. 97-567, at 19 (1982). The ESA requires the Services to consider only the best
 25 available science on the biological security of a species when making a listing decision. 16 U.S.C.
 26 § 1533(b)(1)(A); 50 C.F.R. § 424.11(b) (effective March 4, 2005 – Sept. 25, 2019). Congress
 27 revised the ESA to clarify that listing decisions are to be based solely on the best available science
 28 after then-Secretary of the Interior James Watt insisted that listing decisions be subject to

1 economic analysis and veto by the Office of Management and Budget when they had negative
 2 economic consequences. Curtis & Davison, *The Endangered Species Act: Thirty-Eight Years on*
 3 *the Ark*, at 141-42. The best available science “standard does not require that FWS act only when
 4 it can justify its decision with absolute confidence.” *Ariz. Cattle Growers' Ass'n v. Salazar*, 606
 5 F.3d 1160, 1164 (9th Cir. 2010) (citing *Pub. Citizen Health Research Group v. U.S. Dep't of*
 6 *Labor*, 557 F.3d 165, 176 (3d Cir. 2009)); *Greenpeace Action v. Franklin*, 982 F.2d 1342, 1354-55
 7 (9th Cir. 1992). Rather, the ESA encourages the Services to make listing decisions in the face of
 8 uncertainty because of the permanence of extinction. *See Salazar*, 606 F.3d at 1164.

9 *Critical Habitat Designations were Intended to Support the Recovery of Listed Species by*
 10 *Countering Habitat Destruction, the Primary Cause of Species Decline.*

11 Unlike species listing decisions, the ESA allows the Services to account for economic
 12 considerations in critical habitat designations. 16 U.S.C. § 1533(b)(2). The change in factors
 13 appropriate for consideration with respect to critical habitat designation represents the balance
 14 Congress struck between the responsibility of mankind as species conservator, and the competitive
 15 need of United States for continued development and invention.

16 In developing the ESA, Congress determined that “the most significant [threat facing
 17 imperiled species] has proven also to be the most difficult to control: the destruction of critical
 18 habitat.” H.R. Rep. 93-412. Congress provided critical habitat designation as a mechanism for the
 19 Services to protect the environment in which imperiled species reside and on which they depend
 20 for recovery. *See* 16 U.S.C. §§ 1532(5), 1533(a)(3)(A)(i). Congress recognized that protecting an
 21 imperiled species’ critical habitat from destruction had the incidental effect of protecting all the
 22 species that reside in the same environment. H.R. Rep. No. 95-1625 at 17 (Sept. 25, 1978), U.S.
 23 Code Cong. & Admin. News 1978, pp. 9453, 9467. Congress intended the Services to designate
 24 critical habitat for most species because the designations greatly benefit the unlisted majority of
 25 species. *Id.* Despite this, only 20 percent of listed species have designated critical habitat, and
 26 habitat destruction remains the predominant cause of species endangerment. Sandra Diaz et al.,
 27 *Pervasive Human-Driven Decline of Life on Earth Points to the Need for Transformative Change*,
 28 366 SCIENCE 3, 4 (2019); J.B. Ruhl, *Section 4 of the ESA—The Cornerstone of Species Protection*

1 *Law*, 8(1) NAT. RESOURCES & ENV'T 26, 70 (1993).

2 **B. Section 4(d) Establishes Protective Measures to Restore the Population of**
 3 **Threatened Species Before They Become Endangered and Their Extinction**
Becomes More Probable Than Not.

4 Congress created Section 4(d) to provide the Services with a mechanism to implement
 5 protections for threatened species that halt their progress towards endangerment and extinction.
 6 Courts agree that the Services must do more than simply determine that a species is threatened—
 7 they are required to take affirmative steps to prevent the species from becoming endangered. *Def.*
 8 *of Wildlife v. Norton*, 258 F.3d at 1142 (Congress intended to give FWS "the ability to... take
 9 steps to insure that species which are likely to be *threatened* with extinction never reach the state
 10 of being presently endangered.") (quoting 120 Cong. Rec. 25,668 (1973)); *Or. Nat. Res. Council v.*
 11 *Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (finding the purpose of listing species is not simply
 12 to memorialize those on the path to extinction, but also to compel those changes needed to save
 13 the species from extinction); *Def. of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C. 1977)
 14 (finding the Service must do more than merely avoid the elimination of a protected species—it
 15 must recover the species).

16 Section 4(d) requires the Services to issue regulations to conserve threatened species,
 17 including extending any or all Section 9 “take”⁸ prohibitions to threatened species. 16 U.S.C. §
 18 1533(d). The Services’ prior long-standing regulation implementing Section 4(d) extended a
 19 blanket protection to threatened species where nearly all Section 9 “take” prohibitions were
 20 applicable to threatened species immediately upon listing. 50 C.F.R. § 17.31(a) (effective March
 21 4, 2005 – Sept. 25, 2019). For certain species, the FWS promulgated “special” protective
 22 regulations which described the applicable prohibitions and exceptions for that species, but that
 23 was a rare occurrence. *Id.* § 17.31(c) (effective March 4, 2005 – Sept. 25, 2019). Although Section
 24 4(d) provides the Services with discretionary authority as to how they “take preventative measures
 25 *before* a species is conclusively headed for extinction,” the FWS has consistently applied the
 26 blanket approach for nearly 40 years. *Def. of Wildlife v. Babbitt*, 958 F.Supp. 670, 679–80 (D.D.C.

27 _____
 28 ⁸ The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or
 collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

1997) (emphasis added).

C. Section 7 Consultation Integrates and Prioritizes the Protection of Listed Species in the Primary Missions of All Federal Agencies.

Under Section 7, “all... federal agencies shall... utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1). In Section 7, Congress made a conscious decision to prioritize the conservation of endangered species over the primary missions of all other federal agencies. Curtis & Davison, *The Endangered Species Act: Thirty-Eight Years on the Ark*, at 144. Section 7 clearly bestows a duty to conserve listed species on all federal agencies. In fact, “one would be hard pressed to find a statutory provision whose terms were any plainer than those in Section 7.” *TVA v. Hill*, 437 U.S. at 173. This duty requires all federal agencies to participate in consultation with the Services prior to commencing a federally authorized or funded action to “insure” that the action will not jeopardize the continued existence of any listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2).

The long-standing prior regulations implementing Section 7 required a federal agency proposing a project to consult with the Services and provide them with a report describing the anticipated activity, a wide range of potential alternatives, and an analysis of their environmental impacts. 50 C.F.R. § 402.14(c) (effective March 4, 2005 – Sept. 25, 2019). The proposing agency was required to commit to, or to have already taken, mitigation actions before the Services considered any beneficial effects of the proposed activity. 16 U.S.C. § 1536(b)(3)(A). Proposing agencies and the Services were required to reinitiate consultation, if a new species listing or new designation of critical habitat might have affected a previously approved action. *Id.* § 1536(a)(3); 50 C.F.R. §§ 402.14(g), 402.02, 402.16 (effective March 4, 2005 – Sept. 25, 2019). During consultation, the Services were also required to account for any proposed project’s incremental alteration to, and degradation of, critical habitat. 16 U.S.C. § 1536(b)(3)(A). The Services’ assessment of impacts to critical habitat are essential to the mission of the ESA because habitat destruction is the primary cause of species decline. H.R. Rep. 93-412; Diaz et al., at 4; J.B. Ruhl, at 70. Therefore, these assessments guarantee that all the other conservation efforts performed

1 under the ESA are not undermined, ensuring that the regulatory scheme is effectively carried out.

2 **III. THE CHALLENGED REGULATIONS UNDERMINE THE ESA’S WELL-**
 3 **CRAFTED STRUCTURE AND THREATEN ITS CONTINUED SUCCESS IN**
 4 **CONSERVING IMPERILED SPECIES.**

5 The challenged final regulations collectively interact to dismantle key species’ protections
 6 afforded under the ESA. The challenged regulations grant excessive discretion to the Services in
 7 implementing their duties and invite political interference in what should be purely biological
 8 determinations. Several significant definitional changes made under the guise of “clarity”
 9 contribute to this ambiguity. *See* 50 C.F.R. § 424.02 (effective Sept. 26, 2019) (altering definition
 10 of “physical or biological features” in critical habitat designation); *id.* § 424.11(d) (providing new
 11 definition of “foreseeable future” in the classification decision); *id.* § 402.02 (altering definitions
 12 of “destruction or adverse modification” of critical habitat, “effects of an action” considered in
 13 consultation, and “environmental baseline” in consultation). The contested regulations effectively
 14 dismantle the ESA from the inside—undermining its well-crafted structure and ultimately leaving
 15 species unprotected.

16 **A. The Final Regulations Allow Non-Biological Factors to Influence the Services’**
 17 **Listing and Classification Decisions.**

18 The final regulations allow the Services to reference non-biological factors in listing
 19 determinations, 84 Fed. Reg. at 45,024 (removing “without reference to possible economic or
 20 other impacts” from listing criteria), and strip threatened species of statutory protections. 84 Fed.
 21 Reg. at 44,753 (“Species listed or reclassified as threatened species after the effective date of this
 22 rule would have protective regulations only if the Service promulgates a species-specific rule.”).
 23 Together, these provisions politicize listing decisions by permitting bases for decisions other than
 24 the best available science. *See* 16 U.S.C. § 1533(b)(1)(A) (requiring that listing determinations be
 25 made “solely on the basis of the best scientific and commercial data available”). Because a
 26 species’ protections now hinge upon its classification (i.e., as endangered rather than threatened),
 27 the initial listing determination is now more important than ever. *Compare* 16 U.S.C. § 1538
 28 (prohibiting “take” of endangered species) *with* 16 U.S.C. § 1533(d) (permitting the Secretary to
 extend the “take” prohibitions of § 1538 to threatened species) *and* 50 C.F.R. § 17.31(a) (noting

1 that the prohibitions in 50 C.F.R. § 17.21 do not apply to species listed or re-classified as
 2 threatened after September 26, 2019 “unless the Secretary has promulgated species-specific
 3 provisions”).

4 Any reference to possible economic impacts in listing determinations will likely support
 5 classifying species as threatened, rather than endangered, thereby excluding those species from
 6 ESA protections due to the revised Section 4(d) regulation.⁹ Allowing economic data to be
 7 considered in the listing process facilitates the argument that a species’ classification should be
 8 less protective than what is biologically necessary because data reflecting the economic impacts of
 9 listing are likely to account for the costs of species conservation, but not the benefits. *Compare*
 10 U.S. FISH & WILDLIFE SERV., FEDERAL AND STATE ENDANGERED AND THREATENED SPECIES
 11 EXPENDITURES FISCAL YEAR 2017 57 (2018) (finding \$1,289,373,123 in total species expenditures
 12 in FY 2017) *with* SOUTHWICK ASSOCIATES, THE ECONOMICS ASSOCIATED WITH OUTDOOR
 13 RECREATION, NATURAL RESOURCES CONSERVATION AND HISTORIC PRESERVATION IN THE UNITED
 14 STATES 3 (2011) (finding that ecosystem services provided by natural habitat in the continental
 15 United States amount to \$1.6 trillion annually). The release of this skewed data may inspire
 16 political opposition to listing determinations or encourage the Services to classify a species as less
 17 imperiled than the best available science reflects.¹⁰

18 Further, the final regulations permit the Services to pursue an initial threatened
 19 classification, or a reclassification from endangered to threatened, for a species in order to benefit
 20 industry, at the expense of imperiled species.¹¹ Under the final regulations, threatened species will
 21 _____

22 ⁹ Although the Services contend that economic data will not impact listing decisions, the
 23 collection and public dissemination of the data indicates that the Services intend this information
 24 to have some effect upon the listing process. Otherwise, collection would be an illogical waste of
 25 scarce agency resources.

26 ¹⁰ For example, political interference prevented the listing of the Dunes Sagebrush Lizard. *See*
 27 *e.g.*, Jerry Patterson, *Lizard must not impede energy future*, AMARILLO GLOBE-NEWS (June 11,
 2011), <https://www.amarillo.com/opinion/opinion-columnist/guest-opinion-columnist/2011-06-11/patterson-lizard-must-not-impede-energy-future#.TsbXcnJuqSo>; *see also* Transcript of
 Personnel Hearing, *Gary Mowad v. Dep’t of the Interior*, DA-1221-13-0262-W-4. (Aug. 18,
 2014).

28 ¹¹ There are numerous examples of FWS and NMFS officials who either come from industry, or
 retain financial ties to industry, performing their duties under the ESA to benefit industry. *See e.g.*,

1 receive Section 9 take protections only if the Services promulgate species-specific protective
 2 regulations, which is not required. 84 Fed. Reg. at 44,753; 50 C.F.R. § 17.31(a) (noting that the
 3 prohibitions in 50 C.F.R. § 17.21 do not apply to species listed or re-classified as threatened after
 4 September 26, 2019 “unless the Secretary has promulgated species-specific provisions”). If the
 5 Services refuse to promulgate species-specific regulations, industry will benefit from reduced
 6 compliance burdens because no Section 9 take prohibitions will apply to the newly-listed or
 7 reclassified threatened species, and Section 7 consultation will be the only regulatory burden.
 8 Historically, species-specific protective regulations were criticized for being more *permissive* of
 9 human activity—including industry activity—than *protective* of species. YA-WEI LI, DEFENDERS
 10 OF WILDLIFE, SECTION 4(D) RULES: THE PERIL AND THE PROMISE 2 (2017); *see also* Endangered
 11 and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg.
 12 20,074 (Apr. 10, 2014) (authorizing high-impact development activities that threatened the
 13 species’ habitat and members); Endangered and Threatened Wildlife and Plants; Exclusion of U.S.
 14 Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 70
 15 Fed. Reg. 52,310 (Sept. 2, 2005) (permitting the canned-hunting industry to breed and offer the
 16 species for on-site sport hunting).

17 Lastly, the final regulations not only slacken the criteria to delist species at the expense of
 18 species’ recovery, but they also alter the Services’ decision to delist from a discretionary to a
 19 mandatory duty. *Compare* 50 C.F.R. § 424.11(d) (1984) *with* 50 C.F.R. § 424.11(e) (2019). The
 20 new delisting criteria are also far less stringent than prior criteria, which maintained protections
 21 for species until data demonstrated the protections were no longer warranted.¹² Now, species will
 22 be delisted without rigorous proof of recovery or extinction. 50 C.F.R. § 424.11(e) (2019).

23 _____
 24 UNION OF CONCERNED SCIENTISTS, U.S. FISH AND WILDLIFE SCIENCE SURVEY SUMMARY 1 (2005)
 25 (“More than half of all respondents (56%) knew of cases where ‘commercial interests have
 26 inappropriately induced the reversal or withdrawal of scientific conclusions or decisions through
 27 political intervention;’ and [m]ore than two out of three staff scientists (70%) and nearly 9 out of
 10 scientist managers (89%) knew of cases ‘where U.S. Department of Interior political
 appointees have injected themselves into Ecological Services determinations.’”); Charlie Savage,
Report Finds Meddling in Interior Dept. Actions, N.Y. TIMES (Dec. 15, 2008),
<https://www.nytimes.com/2008/12/16/washington/16interior.html>.

12 The prior regulations only permitted delisting if robust evidence proved a species to be extinct,
 recovered, or originally classified in error. 50 C.F.R. § 424.11(d) (1984).

Further, the mandate that species meeting the new, lessened criteria be delisted prioritizes removing species from federal protection over the conservation of species. These changes will leave imperiled species, including near-extinct species, totally stripped of protections through Section 9 take prohibitions and Section 7 consultation, further risking extinction.

B. The Final Regulations Ignore the Benefits of Reducing Controllable Threats to Species and Allow Cumulative Impacts to Chip Away at Species and Their Habitats.

The prior regulations identified what actions would harm species and identified actions for agencies, including the Services, to take to prevent those threats. The challenged final regulations collectively ignore impending threats to species and permit cumulative threats that incrementally harm species and their habitats to go unaddressed until those threats would foreclose the possibility of species survival.

First, the Services underestimate the benefits of blanket Section 9 protections for threatened species. Stripping newly-listed or reclassified threatened species of all Section 9 protections unless and until the Services decide to promulgate a species-specific protective regulation ignores the benefits of reducing controllable threats to species. Specifically, even if a manner of “take” prohibited in Section 9 is not a species’ primary threat, when it comes to extinction, it is always better to be over-protective than under-protective. Martin F.J. Taylor et al., *The Effectiveness of the Endangered Species Act*, 55(4) BIOSCIENCE at 361-65; Schwartz, *The Performance of the Endangered Species Act*, 39 ANN. REV. OF ECOLOGY, EVOLUTION, & SYSTEMATICS at 290. Under these final regulations, threatened species have essentially no protections because promulgation of a species-specific protective regulation is not required, 84 Fed. Reg. at 44,753; 50 C.F.R. § 17.31(a) (noting that the prohibitions in 50 C.F.R. § 17.21 do not apply to species listed or re-classified as threatened after September 26, 2019 “unless the Secretary has promulgated species-specific provisions”) and the newly-limited scope of the threats and effects considered in the consultation process is unlikely to adequately protect threatened species. See 50 C.F.R. § 402.02 (redefining “effects of the action”); *id.* §§ 402.14(c)(8), 402.16(b), 402.17.

Second, the new restrictions on critical habitat designation and consultation prevent the Services from protecting species from habitat destruction and, instead, permit cumulative threats

1 that incrementally harm species and their habitats. The final regulations will prevent the
 2 designation of new occupied and unoccupied critical habitat by expanding the circumstances in
 3 which critical habitat designation can be found imprudent and by restricting the designation of
 4 unoccupied habitat to circumstances in which occupied areas alone would fail to ensure species'
 5 conservation. 50 C.F.R. §§ 424.02, 424.12. The Services must not narrow the circumstances in
 6 which critical habitat can be designated because habitat loss is the main driver of extinction.
 7 Martin F.J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative*
 8 *Analysis*, 55(4) BIOSCIENCE at 361-65; Schwartz, *The Performance of the Endangered Species*
 9 *Act*, 39 ANN. REV. OF ECOLOGY, EVOLUTION, & SYSTEMATICS at 290; Kieran Suckling & Martin
 10 Taylor, *Critical Habitat and Recovery in THE ENDANGERED SPECIES ACT AT THIRTY: VOLUME 1*
 11 *RENEWING THE CONSERVATION COMMITMENT* (2005). Mitigating further habitat loss through
 12 robust and proactive critical habitat designation would support species' recovery.

13 The final regulations also countenance incremental habitat degradation, which further
 14 exacerbates the perils of habitat loss. The regulations permit incremental degradation of habitat
 15 provided that the habitat "as a whole" maintains its conservation value. 50 C.F.R. § 402.02. This
 16 "as a whole" approach is detrimental to meaningful habitat protection because it both allows
 17 incremental harms in the present and prevents future critical habitat designations. It does this by
 18 allowing habitat to become degraded until it loses those physical or biological features essential to
 19 the conservation of the species—thereby precluding its designation as "critical." *See* 16 U.S.C. §
 20 1532(5) (defining "critical habitat").

21 The final regulations also permit the Services to ignore controllable threats in the
 22 consultation process. Specifically, the regulations now require that "effects of the [agency] action"
 23 considered in consultation would not occur *but-for* the agency action and that those effects must
 24 be *reasonably certain to occur*. 50 C.F.R. § 402.02. This permits the Services to disregard
 25 controllable effects of agency actions that harm species because the agency action is not the *sole*
 26 cause of the threat or because the threat is less likely to happen, without regard to the severity of
 27
 28

1 the threat.¹³

2 **C. The Final Regulations Will Leave Species Vulnerable to Climate Change**
 3 **Related Impacts.**

4 The final regulations fail to protect species threatened by climate change. Ignoring the
 5 threat posed to species by climate change and allowing climate-related threats to continue
 6 unmitigated will only further imperil species. By 2070, between sixteen and fifty-five percent of
 7 species may go extinct. Cristian Román-Palacios & John J. Wiens, *Recent responses to climate*
 8 *change reveal the drivers of species extinction and survival*, 117(8) PNAS 4211-4213 (2020).

9 First, the final regulations provide the Services with excessive discretion to determine
 10 when climate-related threats can serve as the basis for threatened classification. A species
 11 imperiled by climate-related threats can only be classified as threatened if, in the Services’
 12 discretion, those threats are likely to endanger the species within the “foreseeable future.” 50
 13 C.F.R. § 424.11(d) (effective Sept. 26, 2019). The new definition of “foreseeable future” is
 14 intentionally vague and the determination of what qualifies as the “foreseeable future” will be
 15 made on a case-by-case basis. 84 Fed. Reg. at 45,020. This permits the Services to withhold
 16 protections from species imperiled by climate-related threats based solely on their discretionary
 17 determination of what is “foreseeable,” which the Services can manipulate to serve political will.

18 Further, the final regulations provide the Services with excessive discretion in designating
 19 critical habitat. The Services can now avoid critical habitat designation upon a determination that
 20 designation would be imprudent because “threats to the species’ habitat stem solely from causes
 21 that cannot be addressed through” Section 7 consultation. 50 C.F.R. § 424.12(a)(1)(ii). The final
 22 regulation states that the Services can deem critical habitat designation imprudent for species
 23 threatened by “melting glaciers, sea level rise, or reduced snowpack.” 84 Fed. Reg. at 45,042. The
 24 Services essentially conclude that critical habitat designation is useless, if future consultations for
 25 hypothetical agency actions would not address climate-related destruction of species’ habitats.

26 _____
 27 ¹³ For example, in consultation for the proposed construction of a federal right-of-way, the
 28 development of a private wind farm on non-federal lands would not be an effect of the proposed
 action considered in consultation if a prospective alternative approach to realize the effect (e.g., a
 private access road) might exist. 84 Fed. Reg. at 44,977.

1 This permits the Services to leave imperiled species vulnerable to climate change and to ignore the
 2 importance of protecting species' habitats as climate change worsens.

3 Additionally, this new exception to critical habitat designation, combined with the new
 4 provision preventing unoccupied critical habitat designation without designation of occupied
 5 habitat, 50 C.F.R. § 424.12(b), will prevent the protection of habitat that will be essential for
 6 species survival after climate-induced species migration. *See* John Kostyack et al., *Beyond*
 7 *Reserves and Corridors: Policy Solutions to Facilitate the Movement of Plants and Animals in a*
 8 *Changing Climate*, 61 BIOSCIENCE 713, 717 (2011).¹⁴ Together, these regulations prevent robust
 9 critical habitat designation, decreasing the likelihood of species survival and rendering useless one
 10 of the ESA's key functions that facilitates species recovery. Suckling & Taylor, *Critical Habitat*
 11 *and Recovery*, at 89.

12 Second, the final regulations permit the Services to ignore climate-related threats to species
 13 and their habitats during Section 7 consultation. The final regulations redefine "effects of the
 14 action" considered during consultation as consequences reasonably certain to occur that would not
 15 occur but-for the proposed agency action. 50 C.F.R. § 402.02. The final regulations provide the
 16 Services with excessive discretion to determine which effects are reasonably certain to occur and
 17 which effects will be ignored as tangential or uncertain climate-related threats.

18 Perhaps most importantly, the regulatory changes effectively ensure that any critical
 19 habitat that is designated under the new regulatory regime will either be of lower quality or not as
 20 expansive as would be designated under the prior regime. This will have dire consequences for
 21 species whose habitats are irreparably altered or simply erased due to climate change. Specifically,
 22 the final regulations permit the incremental degradation of designated critical habitat, provided
 23 that the habitat retains its conservation value "as a whole." *Id.* The final regulations also permit the
 24 Services to ignore the consequences of proposed agency actions that are "remote in time" or
 25 "reached through a lengthy causal chain" in Section 7 consultation. *Id.* § 402.17(b). These
 26

27 ¹⁴ Further, because these post-climate migration habitats will not be protected as "critical," they
 28 will not receive the Section 7 consultation protections that attach to "critical" habitats despite the
 importance of the habitat to species survival.

provisions allow the Services to find that climate change-related habitat degradation does not alter the current conservation value of the habitat “as a whole” and that climate-related impacts upon the habitat and species are too remote to consider in consultation. This lack of robust critical habitat designation and protection will ultimately render certain species’ critical habitat unsuitable to support their recovery as climate change worsens.

CONCLUSION

Because the final regulations considered in this brief contort the ESA’s requirements and render the “pit bull of environmental laws”¹⁵ toothless, this Court should grant plaintiffs’ motion for summary judgment and block the implementation of the Services’ final regulations.

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ENVIRONMENTAL LAW PROFESSORS

¹⁵ Timothy Egan, *Strongest U.S. Environmental Law May Become Endangered Species*, N.Y. TIMES (May 26, 1992), <https://www.nytimes.com/1992/05/26/us/strongest-us-environment-law-may-become-endangered-species.html?pagewanted=all>.

ADDENDUM

IDENTITY OF *AMICI CURIAE*

- William L. Andreen, Edgar L. Clarkson Professor of Law and Director, Alabama-ANU Exchange Program, The University of Alabama School of Law
- Michael C. Blumm, Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School
- William W. Buzbee, Edward and Carole Walter Professor of Law, Georgetown University Law Center
- Kim Diana Connolly, Professor of Law, Director of Clinical Legal Education, Vice Dean for Advocacy and Experiential Education, University at Buffalo School of Law, State University of New York
- Myanna F. Dellinger, Professor of Law, University of South Dakota School of Law
- Timothy Duane, Professor in Residence, University of San Diego School of Law
- Richard M. Frank, Professor of Environmental Practice, Director, California Environmental Law & Policy Center, University of California – Davis School of Law
- Sam Kalen, Associate Dean, William T. Schwartz Distinguished Professor of Law, Co-Director, Center for Law and Energy Resources in the Rockies, University of Wyoming College of Law
- Albert C. Lin, Martin Luther King Jr. Professor of Law, University of California – Davis School of Law
- Linda A. Malone, Marshall-Wythe Foundation Professor of Law, William and Mary Law School
- Patrick C. McGinley, Charles H. Haden II Professor of Law, West Virginia University College of Law
- Joel A. Mintz, Professor of Law Emeritus and C. William Trout Senior Fellow in Public Interest Law, Nova Southeastern University College of Law
- Patrick Parenteau, Professor of Law, Senior Counsel, Environmental Advocacy Clinic, Vermont Law School
- Anne Powers, Professor, Pace University Elisabeth Haub School of Law
- Zygmunt Plater, Professor of Law, Boston College Law School
- Kalyani Robbins, Morris I. Leibman Professor of Law, Loyola University Chicago School of Law
- Irma S. Russell, Edward A. Smith / Missouri Endowed Chair in Law, the Constitution, and Society, University of Missouri-Kansas City School of Law

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CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

I hereby certify that on this 25th day of January, 2021, I electronically filed the foregoing **BRIEF OF ENVIRONMENTAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system.

/s/ Patricia Larkin
PATRICIA LARKIN